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No. 85-623 (2)
85-646 (2)

In The
# Supreme Court of the United States
October Term, 1985

DALLAS COUNTY, TEXAS, ET AL.,
Petitioners,

v.

STEPHEN C. CRANE,
on behalf of himself
and others similarly situated,
Respondent.

## RESPONDENT'S JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

### (In 85-623)

1. Whether a Texas District Attorney is a State officer whose acts constitute state policy, not county policy, requiring attorney fees under 42 U.S.C. § 1988 to be assessed against the state if Respondent Crane is a prevailing party and prohibiting the assessment of damages under 42 U.S.C. § 1983 because of Prosecutorial and/or Eleventh Amendment immunity?

2. Whether a misdemeanor justice system which authorizes prosecution by information based on affidavit of complaint followed by the clerk issuing a capias writ and further provides an accused the right to a determination of probable cause at his first appearance before a judicial officer prior to extended detention is in violation of Texas statutes and/or the Fourth Amendment?

### (In 85-646)

1. Whether a Texas District Attorney is immune from a civil claim for damages arising from the performance of his official duties to initiate or present the state's case in a criminal prosecution?

2. Whether a Texas District Attorney is a state officer whose official acts constitute state action and is accordingly immune from a civil claim for damages under the Eleventh Amendment to the United States Constitution?

## LISTING OF PARTIES

PETITIONERS, No. 85-623:

Dallas County, Texas
Ben Ellis, Judge, Dallas County Criminal Court No. 1
John Orvis, Judge, Dallas County Criminal Court No. 2
Mike Schwille, Judge, Dallas County Criminal Court No. 3
Berlaind Brashear, Judge, Dallas County Criminal Court No. 6
John McCall, Judge, Dallas County Criminal Court No. 7 (replaced Chuck Miller)

ATTORNEYS FOR PETITIONERS, No. 85-623:

Law Offices of Earl Luna, P.C.
Earl Luna
Robert E. Luna
Mary Milford

PETITIONER, No. 85-646:

Henry Wade, Dallas County District Attorney

ATTORNEY FOR PETITIONER, No. 85-646:

Peter Harlan, Dallas County Assistant Criminal District Attorney

RESPONDENTS:

Stephen C. Crane, on behalf of himself and others similarly situated

ATTORNEY FOR RESPONDENTS:

Johnston, Larson & Trantham
Douglas R. Larson

INTERESTED PARTIES:

State of Texas
Earl Bullock, Dallas County Clerk
L. E. Murdoch, Former Dallas County Clerk

ATTORNEYS FOR INTERESTED PARTIES:

Jim Mattox, Attorney General
Larry King, Assistant Attorney General
Sue LaGarde, Dallas County Assistant Criminal District Attorney

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## RESPONDENT'S JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW Respondent STEPHEN C. CRANE, on behalf of himself and others similarly situated and files their Brief in Opposition to Petitioners' petitions for

Writ of Certiorari, and in support thereof would respectfully show the following:

## GROUNDS FOR JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on May 2, 1985, and is reported at 759 F.2d 412. Petitioners' respective Petitions for Rehearing and Suggestion for Rehearing En Banc were denied on July 22, 1985, and Petitioners' respective Petition for a Writ of Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Respondent questions the standing of some of the petitioners before this Court and that is discussed herein.

## STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983

42 U.S.C. § 1988

Fourth Amendment to the United States Constitution

Eleventh Amendment to the United States Constitution

## STATEMENT OF THE CASE

The facts stated in both Dallas County, et al. and Henry Wade's Petitions for Certiorari are essentially accurate, but both are shaded by counsel to place their cause in the most favorable light in an attempt to create issues that do not actually exist. Respondent ,Crane adds the following which, when read in conjunction with both Petitioners' statements of the case more accurately portrays the true, factual context in which this case arose and was later developed.

STEPHEN C. CRANE, a practicing lawyer in Dallas County, Texas, was arrested on April 21, 1980, in Dallas County, Texas, by City of Dallas police officers, on the authority of a warrant issued by the Dallas County Clerk. (r. at 7) Crane was charged with violating Article 43.23 of the Texas Penal Code, "Distribution of Commercial Obscenity", a misdemeanor. (r. at 5, 13)

Crane's arrest arose as a result of an investigation by the Dallas Police Department during March-April 1980, of a movie house in Dallas, Texas, known as the Crystal Theater. (r., vol. XI at 120-121) In the course of the vice investigation, Dallas police officer Buchanan requested and received a copy of the Articles of Incorporation for a corporation bearing the same or similar name as the Crystal Theater from the Texas Secretary of State. (r., vol. XI at 120-121) The Articles of Incorporation had been filed in the Texas Secretary of State's office on May 29, 1979. Also in the course of the investigation, another Dallas police officer, Armando Perez, visited the Crystal Theater in Dallas, Texas, observed films being shown and concluded that they were legally obscene. (r., vol. XI at 223, 231)

The Dallas Police identified Crane as a suspect for the Commercial Obscenity charge solely because the Crystal Theater Inc.'s Articles of Incorporation named Crane as an initial director of that corporation. (r., vol. XI at 132, 231-232) The appearance of Crane's name on the Articles of Incorporation constituted Crane's only contact or association or dealing with Crystal Theater, Inc., with the exception of his subsequent resignation as an initial director of the corporation in 1979 when the Texas Secretary of State returned the filed Articles of Incorporation to the lawyer who had prepared them. (r. at 4) It is common in Texas corporate practice for initial directors to resign after the Articles of Incorporation are returned to the lawyer who prepared and sent them to the Texas Secretary of State. The incorporation was a routine and clerical task. Crane was totally unaware that in March and April, 1980, Crystal Theater, Inc., was operating a moving picture theater in the City of Dallas, Texas. (r. at 4) Neither the Dallas police nor prosecutor Wade had any evidence that Crane knew about the "obscene movies" or even that Crane knew about the theater. Crane's name was on the Articles of Incorporation because a lawyer who shared office space with Crane had placed Crane's name on the Articles or Incorporation without Crane's prior knowledge or approval.

Without further investigation and based solely upon the fact that Crane's name appeared on the Articles, the Dallas Police Department subsequently sent to the Dallas County Criminal District Attorney's office a case report alleging that Crane was engaged in "Commercial Obscenity." (r., vol. XI at 154, 155, 223, 231) The Dallas County Criminal District Attorney's office reviewed the case report submitted by the Dallas Police and promptly pre-

pared a criminal information and accompanying affidavit (complaint).[1] The District Attorney's review constituted little more than directions to his secretary on which affidavit and information form to select and directions to the secretary to fill in the appropriate blanks in a snap out, partially preprinted form containing carbon paper that, when typed, simultaneously prepared the "affidavit" and an "information". The blanks were filled in with Crane's full name, the date of the alleged offense and the appropriate conclusionary language from the Texas Penal Code which constituted the offense of commercial obscenity. (r., vol. XII at 497) The criminal information and conclusionary affidavit charging Crane with commercial obscenity were then filed with the Dallas County Clerk L.E. Murdock's office.

Upon receipt of the criminal information and supporting conclusionary affidavit from Wade's office, an assistant Dallas County clerk without any judicial supervision prepared a capias arrest warrant simply by typing the name of the accused (Crane) and the charge on a (capias) arrest form which was then signed or stamped with the clerk's signature and affixed with the County Clerk's seal. The (capias) warrant was given to the police, which directed the arrest of the accused. (r., vol. XII at 614) The clerk's function in issuing the writs was purely ministerial or administrative in nature. (r., vol. XIII at 616, 618) Neither the clerk or deputy clerk made any determination of probable cause before issuing the (capias) arrest war-

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[1] In Texas Criminal Practice, the term "complaint" and "affidavit" are often used interchangeably and are used in that way in this case. See, Texas Code of Criminal Procedures, Art. 2.04, 2.05, 15.04, 21.22, 27.03(1).

rants. Neither the Clerk, L.E. Murdock, nor any of his deputies had any legal training or legal supervision to make any sort of probable cause determination. None of the assistant clerks were assigned to a particular judge or employed by one. County Clerk L. E. Murdock's office followed the same procedure for the issuance of capias arrest warrants which had been in effect for many years. (r., vol. XIII at 614, 615) This procedure was established by Wade, and was totally under Wade's control and supervision. This same procedure was followed 800-1000 times a week in each case involving a misdemeanor, and each time a warrant was issued. Wade has been the Dallas County District Attorney continuously since 1951. Virtually all the affidavits filed with the Dallas County Clerk by Wade's office supporting the information were conclusionary in nature. No "neutral and detached magistrate" in the above-outlined procedure determined that probable cause existed for the issuance of any of these arrest warrants unless one concludes that Wade's office unlawfully assumed that role. (r. at 295)

Crane's arrest came about as a result of the arrest warrant procedure described above, on the authority of the (capias) arrest warrant issued by the Dallas County Clerk. (r., vol. XII at 171, 172) Despite the fact that the Dallas County Jail sits on top of the Dallas County Courthouse and Crane was arrested on a weekday when the Courthouse was open for business; Crane was taken directly to the Dallas County jail where he spent approximately four hours until a bail bond was posted for him and he was released. (r., vol. XXIII at 728)

On April 28, 1980, after Crane had demanded a trial, the criminal charges of commercial obscenity were dis-

missed at the request of the Dallas County Criminal District Attorney's office due to insufficient evidence, and because of the belated discovery of Crane's lack of connection with the theater. (r. at 265)

On July 30, 1980, Crane filed this action in the Federal District Court for the Northern District of Texas, Dallas Division. (r. at 1) After the District Court had indicated that the procedure outlined above for the issuance of capias warrants was unlawful; Wade issued directives which had the ultimate effect of changing the system which then required "probable cause affidavits" and review of each "probable cause affidavit" by a detached, neutral magistrate before any (capias) arrest warrant would issue.[2]

———o———

## SUMMARY OF ARGUMENT

Respondent Crane submits that both petitions for certiorari are frivolous and without merit and neither petition truly presents this Court with any issue that this Court has not previously considered and/or settled. Respondent contends that this Court has already, in effect, determined that a Texas county is not entitled to immunity pursuant to the Eleventh Amendment, and in any event, neither petitioner has presented any reason in law or fact for this Court to extend the protection of the Eleventh Amendment to Dallas County. Nor has either Petitioner stated any

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[2] This statement of the case is an expansion of the District Court's findings of fact and a further elaboration of the facts recited by the Court of Appeals at 759 F.2d 414-415.

real reason to seriously consider extending the Eleventh Amendment to Dallas County prosecutor Wade. Wade is not himself the State of Texas, nor is he a state official with state-wide authority. In effect, Wade's prosecutorial immunity has not been violated because Wade is not paying Crane's damages. Dallas County is. Further, Wade's responsibility was not bottomed upon his decision to prosecute Crane, but because he caused the arrest of Crane and his class by his establishment of an unconstitutional system of issuing arrest warrants without probable cause or probable cause determinations by a detached, neutral magistrate. Respondent also suggests that the Court of Appeals for the Fifth Circuit did not only hold Dallas County responsible because of Wade's conduct but also because of the conduct of the County Clerk L. E. Murdock. Murdock's office issued the warrants which caused Crane and his class to be arrested. Respondent also contends that the petition for certiorari filed by Dallas County, et al. is defective for two reasons: Respondent believes that the Dallas County Criminal Court Judges have no standing to be before this Court and counsel for Petitioner Dallas County has apparently misread this Court's decisions to sanction the issuance of an arrest warrant without probable cause and without the involvement of a detached, neutral magistrate in the decision to issue a warrant. Instead of attempting to respond just to the questions that Petitioners assert are reasons for this Court to issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit, Respondent has broken down his brief in response into six sections, which deal separately with each purported issue raised by the respective petitioners. Fortunately for the Respondent, the Court of Appeals opinions found at

759 F.2d 412 and 766 F.2d 193 remain the best brief in response to the Petitioners' claims.

## ARGUMENT

### I. There Is No Reason In Law Or In Fact To Grant Dallas County Eleventh Amendment Immunity.

It is very difficult to accurately ascertain what Petitioners are actually saying in their petition in regards to the Eleventh Amendment issue they insist merits review by this Court. Several cases have been cited by Petitioners to the effect that a federal court is required to look to state law as a source to determine the status of an entity in relation to the Eleventh Amendment.[3] Respondent does not quarrel with this proposition. None of the cases cited by Petitioner Dallas County conflict with the Court of Appeals opinion in this case. Nor does Respondent take any particular issue with any of them. The Court of Appeals carefully considered each of Petitioner's Texas statutory and Texas case authorities with regard to the Eleventh Amendment status of Dallas County. Each case cited by Petitioners Dallas County, et al., was carefully analyzed

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[3] *Blake v. Kline*, 612 F.2d 718 (1979), cert. denied 447 U.S. 1921, 100 S.Ct. 3011 (1980); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (1984), cert. denied 105 S.Ct. 796 (1985); *Fouche v. Jekyll Island—State Park Authority*, 713 F.2d 1518 (11th Cir. 1983); *Sessions v. Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981); *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975); *Unified School District No. 480 v. Epperson*, 583 F.2d 1118 (1978); *FitzPatrick v. Bitzer*, 519 F.2d 559 (1975), affirmed in part, reversed in part 427 U.S. 445, 96 S.Ct. 2666 (1976); *Matheson v. Long Island Park Comm'n*, 442 F.2d 566 (2nd Cir. 1971); *Adden v. Middlebrooks*, 688 F.2d 1147 (1982), and *Korgich v. Regents of New Mexico School of Mines*, 582 F.2d 549 (10th Cir. 1978).

and rejected as requiring Eleventh Amendment protection for Dallas County.[4]

Totally absent from Dallas County's Petition are any reasons which can be subjected to analysis as to why a Texas county is entitled to Eleventh Amendment immunity. When this case was before the Court of Appeals, Dallas County attempted to claim that a Texas county is unique and, for that reason, it should be given Eleventh Amendment protection. The Court of Appeals correctly rejected this argument because there is really nothing unique about a Texas county. In any event, this Court has stated in relation to state law resources in relation to an Eleventh Amendment claim that a federal court must look "beyond simpl[e] . . . generalization to make a 'detailed examination' of the powers of a county." *Moor v. County of Alameda,* 411 U.S. 693 at 719, 93 S.Ct. 1785 at 1860 (1979). Further, the Court of Appeals correctly pointed out that this Court has already implicitly rejected Eleventh Amendment immunity for a Texas county in *Avery v. Midland County,* 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed. 2d 45 (1968). This Court in *Avery* stated as follows:

> The Texas commissioners courts are assigned some tasks which would normally be thought of as "legislative," others typically assigned to "executive" or "administrative" departments, and still others which are "judicial". In this regard, *Midland County's Commissioners Court is representative of most of the general governing bodies of American cities, counties,*

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[4] The Texas Attorney General doesn't believe that Dallas County is a state agency. In fact, his position throughout this litigation was that Dallas County was not entitled to Eleventh Immunity.

> *towns, and villages.* One knowledgeable commentator has written of "the states' varied, pragmatic approach in establishing governments." R. Wood, in Politics and Government in the United States 891-892 (A. Westin ed. 1965). That approach has produced a staggering number of governmental units—the preliminary calculation by the Bureau of the Census for 1967 is that there are 81,304 "units of government" in the United States—and an even more staggering diversity. Nonetheless, while special-purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs. *In many cases, citizens reside within and are subject to two such governments, a city and a county. The Midland County Commissioners Court is such a unit.*

390 U.S. at 482-83, 88 S.Ct. at 119-20. [emphasis added] [footnotes omitted]

The Eleventh Amendment application to counties has been rejected in several other cases brought before the Supreme Court. *Lincoln County v. Luning,* 133 U.S. 529, 20 S.Ct. 363, 33 L.Ed. 766 (1890); *Lake Country Estates, Inc., v. Tahoe Reg. Plan,* 440 U.S. 391, 99 S.Ct. 1171 (1979); *Moor v. County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785 (1973); and *Edelman v. Jordan,* 415 U.S. 651, 667 n.12, 94 S.Ct. 1347, 1358 n.12 (1974) ("a county does not occupy the same position as a State for the purposes of the Eleventh Amendment".

In light of the above authority, the federal courts have formulated several tests or criteria to determine the applicability of the Eleventh Amendment, e.g., *Tradigrain, Inc. v. Mississippi Port Authority,* 701 F.2d 1131 (5th Cir. 1982), *Laje v. R.E. Thomason General Hospital,* 665 F.2d

724 (5th Cir. 1982); *Huber Hunt & Nichols v. Architectural Stone Co.*, 625 F.2d 22 (5th Cir. 1980). These criteria are:

1. whether the entity has been granted the right to hold property;
2. whether the entity has the express authority to sue and be sued in its corporate name;
3. the extent of its independent management authority;
4. the treatment of the entity by the state court;
5. whether the state is responsible for the entity's debt; and,
6. whether the entity and not the state will be primarily responsible for any judgment against it.

The answer to each of these is unquestionably not favorable to Dallas County's position that it is entitled to Eleventh Amendment protection.

Under Texas law, a county is given "corporate powers" and is expressly declared to be "a body corporate and politic". Tex. Rev. Civ. Stat. Ann. Art. 1572 (Vernon 1962). In this capacity, a county may sue and be sued in its own name. Tex. R. Civ. P. 33; Tex. Rev. Civ. Stat. Ann. Arts. 1573, 1578, 1579, 1581 (Vernon 1962). In addition, the county, and apparently the county alone, is liable for all claims against it. Tex. Rev. Civ. Stat. Ann. Arts. 1575 (Vernon 1962) and 2351, § 10 (Vernon 1971). Additionally, the county, acting through its commissioners court, may employ an attorney to assist in the prosecution of claims and suits and may pay for these services out of county funds.[5] *Adams v. Seagler*, 112 Tex. 583, 250 S.W.

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[5] Earl Luna, counsel for Dallas County, et al. herein is not a county official, but a lawyer hired by Dallas County pursuant to this authority.

413 (1923); *O'Quinn v. McVicker,* 428 SW2d 111, 112 (Tex. Civ. App., Beaumont 1968, ref'd n.r.e.). Moreover, a contract by the county employing such an attorney would not bind the State for attorneys fees thereof. *Landman v. State,* 97 SW2d 264 (Tex. Civ. App. El Paso 1936, writ ref'd n.r.e.). At least as to a claim for money allegedly owing to its general fund—the fund which would satisfy a judgment in this case—a county is not exempt from a defense of limitations, as the state would be. *Linz v. Eastland County,* 39 SW2d 599 (Tex.Comm'n.App. 1931, holding approved).

A Texas county may also take, hold and dispose of property for county uses, or for uses that serve the public good. Tex. Rev. Civ. Stat. Ann. Arts. 1576 and 1577 (Vernon 1962). County boundaries may be reduced by the State legislature, but a county may not be abolished altogether. Tex. Rev. Civ. Stat. Ann. Art. 1545 (Vernon 1962); Tex. Const. Art. 9, § 1. If a part of an existing county is to be added to another county by the State, a vote of the electors of the counties affected is necessary. Tex. Rev. Civ. Stat. Ann. Art. 1555-62 (Vernon 1962).

A county may own its own buildings, Tex. Rev. Civ. Stat. Ann. Art. 1603 (Vernon 1962), or it may lease them, Tex. Rev. Civ. Stat. Ann. Art. 2370 (Vernon 1971). It may remodel, improve or equip its facilities on its own motion. Tex. Rev. Civ. Stat. Ann. Art. 2370b (Vernon 1971). Likewise it may dispose of these assets by its own volition. Tex. Rev. Civ. Stat. Ann. Art. 2370e (Vernon 1971). It is entitled to acquire, purchase or use such personal property, appliances or equipment as it deems appropriate. Tex. Rev. Civ. Stat. Ann. Art. 2368a-2 (Vernon 1962).

Counties may enter into contracts, Tex. Rev. Civ. Stat. Ann. Arts. 1580 (Vernon 1962) and 2351 (Vernon 1971) and 2370c-3 (Vernon Supp. 1982) and are liable for their own debt, Tex. Rev. Civ. Stat. Ann. Arts. 1546, 1547, 1548, 1549, and 1575 (Vernon 1962). A county may engage in commerce with the United States, Tex. Rev. Civ. Stat. Ann. Art. 2351 (Vernon 1971), or with another county or city in an adjoining state, Tex. Rev. Civ. Stat. Ann. Art. 2370c-3 (Vernon Supp. 1985).

Financially, counties are empowered to levy and collect a tax for county purposes. Tex. Rev. Stat. Ann. Art. 2352 (Vernon 1971). Such revenues are maintained in a separate county treasury. Tex. Const. Art. 8, § 9. Also, the County Commissioner's court may establish a fiscal or calendar year for the county. Tex. Rev. Civ. Stat. Ann. Art. 1644e (Vernon Supp. 1985). The county has authority to formulate rules and regulations governing the work hours, vacations, holidays, sick leave, medical care, hospitalization, pensions and accident insurance of its employees. Tex. Rev. Civ. Stat. Ann. Art. 2372h (Vernon 1971). It may establish its own independent civil service commission and rules. Tex. Rev. Civ. Stat. Ann. Art. 2372h-6 (Vernon Supp. 1985). Moreover, Texas law states that a county is not to be considered a state agency with respect to laws governing the conduct of state officers and employees. Tex. Rev. Civ. Stat. Ann. Art. 6252-9b (Vernon Supp. 1985) (entity whose authority is limited to a geographical portion of the state is not a "state agency").

In the area of law enforcement, Texas recognizes that county sheriffs and constables have a separate status from state officers, and their authority is derived from the county, not the state. Tex. Code Crim. Proc. Ann. Art. 2.12 and

18.17 (Vernon 1977); *City of Waco, Texas v. Bridges,* 710 F.2d 220 (5th Cir. 1983), cert. denied — U.S. —, 104 S.Ct. 1414, 79 L.Ed. 741 (1984) (the Texas legislature separately recognized "state or county peace officers" in Art. 18.17 to indicate the source of the police officer's power). And under Art. 18.17, a seizure of personal property by a state or county officer accrues to the county and the State has no interest therein. *City of Waco, Texas v. Bridges, supra.*

Finally, unlike state agencies which have jurisdiction across political boundaries, Texas counties have no power or jurisdiction beyond the limits of the county itself. Tex. Const. Art. 5, § 18; *Burke v. Hutcheson,* 537 SW2d 312 (Tex. Civ. App. — Eastland 1976, writ ref. n.r.e.).

The above provisions strongly indicate that Texas counties are independent political subdivisions and not an agency or arm of the state. Most persuasive is the fact that ultimate financial responsibility for the judgment in this case is borne not by the state, but by the County itself. Therefore, Eleventh Amendment protection of the County is not necessary "in order to protect the state treasury from liability that would have . . . essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc., v. Tahoe Regional Planning Agency, supra,* 440 U.S. at 401, 98 S.Ct. at 1177.

## II. The Court Of Appeals For The Fifth Circuit Has Not Violated Wade's Prosecutorial Immunity.

Contrary to the impression created purposely by both petitioners, Wade was not held responsible to Crane for damages because Wade decided to prosecute Crane. Wade was held liable to Crane because he was found responsi-

ble for establishing and maintaining the use of the Dallas County capias warrant system which failed to include constitutionally mandated Fourth Amendment procedures. These missing Fourth Amendment procedures require that an affidavit stating probable cause be submitted to a neutral, detached magistrate before a warrant can issue. *Coolidge v. New Hampshire,* 403 U.S. 443 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Aguilar v. Texas,* 378 U.S. 108 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Giordenello v. U.S.,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *U.S. v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 98 L.Ed. 436 (1948).

In *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), this Court held that prosecutors enjoy absolute immunity from civil liability for actions undertaken in their "quasi-judicial" capacity, which include initiating a prosecution, presenting evidence to a grand jury, and representing the government in a criminal trial. The Supreme Court in *Imbler v. Pachtman, supra,* expressly refused to reach the question of whether investigative or administrative duties of a prosecutor are shielded by absolute immunity, noting that several lower federal court decisions had held they are not. Not surprisingly, federal courts since *Imbler v. Pachtman* have continued to hold that when a prosecutor is involved in a nonadvocative or administrative function, such as the role played by Wade herein, the prosecutor only enjoys qualified immunity. *Gray v. Bell,* 712 F.2d 490 (D.C. Cir. 1983) cert denied — U.S. —, 104 S.Ct. 1599 (1984); *McSurely v. McClellan,* 697 F.2d 309 (D.C. Cir. 1982); *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979); *Jacobson v. Rose,*

592 F.2d 515 (9th Cir. 1978); *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983). Further, the actual participation by a prosecutor in an illegal arrest or an illegal search and seizure is not protected by absolute immunity. *McSurely v. McClellan, supra, Marrero v. City of Hialeah,* 625 F.2d 499 (5th Cir. 1980) and *Apton v. Wilson,* 506 F.2d 83 (D.C. Cir. 1974).

The cases[6] which petitioners allege conflict with the one at bar, and require Supreme Court intervention, all involve decisions by the prosecutor in either the initiation of a prosecution or representing the state in a criminal proceeding. None of these provide any reason to believe that the case at bar has been decided by a court of appeals which was ignorant of *Imbler v. Pachtman.* The prosecutor herein created an automatic arrest warrant which had nothing to do with his decision to prosecute or with his advocacy in court.

There was simply no basis or probable cause for Crane's arrest, and there was no one in Wade's automatic arrest warrant system who could insulate Crane (or his class) from illegal arrest. The mere fact that Crane's name appeared on the Articles of Incorporation does not in and of itself indicate Crane knew anything about the showing of obscene films by the theater almost a year after the forming of the corporation. While it may be a

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[6] *Sykes v. State of California,* 497 F.2d 197 (9th Cir. 1974); *Henzel v. Gerstein, et al.,* 608 F.2d 654 (5th Cir. 1979); *Prince v. Wallace,* 568 F.2d 1176 (5th Cir. 1976); *Taylor v. Kavanagh,* 640 F.2d 450 (2nd Cir. 1981); *Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675 (9th Cir. 1984); *Macko v. Byron,* 641 F.2d 447 (6th Cir. 1981); *Atkins v. Lanning,* 556 F.2d 485 (10th Cir. 1977).

good idea in theory for a member of a board of directors to know everything a corporation does; experience teaches us otherwise. Crane could not have been charged with knowledge or responsibility in any event, because Crane had resigned as a director almost a year before the police saw the obscene movies. The police were even unable to explain how they came to the conclusion that the Crystal Theater was operated by Crystal Theater, Inc.

Wade cannot legitimately claim that he had the authority to make arrest warrant decisions without a detached, neutral magistrate becoming involved. *Mancusi v. Deforte,* 392 U.S. 364, 885 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971).

Respondent contends that the Court of Appeals correctly stated the following in relation to Wade's responsibility:

> In its Memorandum Order of November 30, 1981, the trial court asked the defendants for "concrete proposals" for a new Dallas County system of issuing capias. Id. at 13. The judges and the District Attorney submitted such proposals; they were filed with the court on December 9 and 11, 1981, respectively. The District Attorney had begun to make changes in the system even before this, however. A A letter from the District Attorney to the Chief of Police of the City of Dallas, dated July 20, 1981, announces "I plan certain changes in the procedure for the filing of criminal cases with the Dallas County District Attorney's Office." A memorandum from the District Attorney to "All Police Departments and Agencies Filing Cases with the Dallas County District Attorney's Office", dated September 17, 1981, states "Certain changes in the procedure for the filing of criminal cases with the Dallas County District Attor-

> ney's Office are presently (sic) being implemented." A letter from the District Attorney to Judge Ellis of the Dallas County Criminal Court dated December 7, 1981, begins, "As a result of the recent decision by Judge Higginbotham in Cause No. CA3-80-0978-6, styled *Stephen C. Crane versus State of Texas, et al.*, the following is the form of action this office would like to take — with your cooperation." In none of these communications is there the slightest indication that the District Attorney acted other than independently; there is no hint of any perceived necessity by the District Attorney to consult with or invite the participation of any state official, for example, a member of the State Attorney General's Office. To the contrary, the record plainly shows that the District Attorney was alone responsible for the County system and could change it at will. This fact is implicit in the trial court's Order of February 4, 1982, denying injunctive relief because [B]eginning as early as June 1981, some five months before this court's Memorandum Order of November 30, 1981, defendants voluntarily changed the method used to issue capias in misdemeanor cases. Implementation of this change has proceeded at a steady pace. At all times, defendants have demonstrated by concrete action their good faith effort to achieve a sound and legally sufficient system.

*Crane v. Texas*, 759 F.2d 412 at 429

The Court of Appeals for the Fifth Circuit did not directly discuss the prosecutorial immunity issue because the Court of Appeals determined that Wade was the county official who was responsible for Crane's arrest and he alone established the procedures which led to Crane's arrest. The Court of Appeals also concluded that Dallas County would ultimately pay the damages because Wade

was acting in his official capacity as a county officer when the capias arrest procedures were established.[7]

No reasonable prosecutor,[8] in light of *Mancusi v. DeForte, supra,* and *Coolidge v. New Hampshire, supra,* could have believed that he was a neutral and detached magistrate that could make a probable cause determination for the issuance of an arrest warrant. As a practical matter, Wade's office was the only agency which could have attempted to ascertain probable cause under the challenged system herein, and he did not in any event even attempt to do that. The challenged system was designed by Wade to avoid a neutral magistrate's determination of probable cause by his creation of the automatic arrest warrant. Without doubt, Wade could have easily foreseen that the filing of an information and affidavit by his office through the County Clerk's office would re-

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[7] Needless to say, Dallas County is responsible because *Monell v. Department of Public Services,* 436 U.S. 568, 98 S.Ct. 2018, 56 L.Ed. 611 (1978) teaches us that an official (Wade) with policy-making powers renders the entity responsible for the damages. Texas Law gives Wade the authority to make all decisions for his office of county government.

[8] The requirement that an arrest warrant not issue except on probable cause determined by a neutral and detached magistrate is such a fundamental and indisputable constitutional and legal principle which must be included within the ambit of "clearly established" law envisioned by this Court in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982). There is no morass of conflicting law surrounding this essential tenet. Neither was there substantial confusion in the state of the law nor contrary legal authority on which Wade could rely at the time of Crane's arrest. In the District Court proceedings in the instant case, the jury found Wade "knew or should have known, that the procedure followed in the issuing of capias infringed on a clearly established constitutional right of Stephen Crane." (r. at 1002) Wade's personal liability is clearly fixed.

sult in Crane's illegal arrest, as well as cause an untold number of illegal arrests of the class of persons represented by Crane.

The purpose for the creation of prosecutorial immunity, which is to allow the prosecutor to operate without fear of retribution in his decision to prosecute and to allow the prosecutor to vigorously and fearlessly represent the public, actually disappears when viewed in the context of this case. This is so because the Court of Appeals has said that Wade was acting in his official capacity as a county official and Dallas County will ultimately pay the damages. Wade cannot legitimately say that he fears anything if he personally doesn't have to pay the damages. *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 57 L.Ed.2d 681 (1978); *Kentucky dba Bureau of State Police v. Graham,* — U.S. —, 105 S.Ct. 3099, 85 L.Ed.2d — (1985). This position is buttressed by this Court's decision in *Owen v. City of Independence, Mo.,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), wherein this court determined that qualified immunity or "good faith" on the part of the offending official was not a defense for the city (county). If the good faith of the city official in *Owen* is not an impediment for recovery from the city, neither should Wade's dubious claim of prosecutorial immunity be an impediment for recovery from Dallas County.

## III. District Attorney Wade Is A Local And Not A State Official.

Totally absent from either of Petitioners' Application for Certiorari herein are any reasons for stating that prosecutor Wade is a state officer other than *Baker v. Wade,*

769 F.2d 289 (5th Cir. 1985). *Baker v. Wade* was cited for the proposition that a prosecutor represents the state in a criminal proceeding and is empowered to intervene in a federal lawsuit. Respondent does not quarrel with that proposition because that is true. But that should only be taken in the abstract sense, because Wade is not himself a political entity. Wade is just a lawyer representing a client which in this case happens to be the people of the State of Texas located in Dallas county. A lawyer who represents an entity does not himself become the entity because of his representation.

Wade is clearly a local official and the Court of Appeals for the Fifth Circuit correctly characterized him as such.

> Other and more significant factors, generally speaking, argue that he is a local official. He is elected by the voters of his district, usually one county. Tex.Const. Art. V, § 21. His major powers and duties—which concern the prosecution of serious crimes and which he exercises alone and without responsibility to the State Attorney General, who has no general prosecutorial powers—are limited to the territory of his district. He is paid by county funds, although these are partly reimbursed by the state. And the significance of the creation of his office by the State Constitution is diminished by the circumstance that other local offices are created by it as well. See *e.g.*, Article V, § 19 (Justice of the peace) and § 20 (County clerks). In sum, much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but limited in the exercise of those powers to the county, filled by its voters, and paid for with its funds. As for the case in hand, District Attorney Wade was responsible for the county policy attacked and conclusively demonstrated his ability to alter it on his own by doing that very thing.

> For present purposes, then, we conclude that he is properly viewed as a county official, elected by its voters and responsible for its relevant policy. In such circumstances, we see no injustice in holding the County responsible for his actions of this sort. Doubtless he is also in some senses an officer of the State (or of the state), at least as ultimately deriving the powers of his office from that source. But even were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements. At all events, his immunity or want of it is of little practical consequence. The joint and several judgment against him in his official capacity only and against the county will expend itself on the county treasury. See, *Kentucky, dba Bureau of State Police, Petitioner v. James E. Graham, et al.*, — U.S. —, 105 S.Ct. 3099, 85 L.Ed.2d — (1985).

*Crane v. State of Texas*, 766 F.2d at 195.

## IV. There Are Other Reasons To Justify The Result Reached By The Court Of Appeals.

Even if one concludes that Wade's automatic warrant system comes within the ambit of *Imbler v. Pachtman, supra*, there are still reasons for requiring Dallas County to pay the damages and to uphold the result reached by the Court of Appeals for the Fifth Circuit. In the trial court, Plaintiff Crane sought damages from County Clerk Murdock as well as Dallas County and prosecutor Wade.

Both the County and the clerk were held not to be responsible for the damages by the District Court.[9] Both of these issues were presented to the Court of Appeals. The Court of Appeals did not mention very much about the clerk in its opinion, probably because the Court of Appeals had already determined that Dallas County would ultimately pay the damages, etc. The Court of Appeals quite clearly meant to make all the Defendants liable to Crane. "Crane contends that the trial court erred in holding all Defendants immune from liability for money damages. We agree, although for reasons different from those offered by Crane." *Crane v. State of Texas*, 759 F.2d at 427. County Clerk Murdock is clearly a local county official with the power to make policy for his office in accordance with *Monell v. Department of Public Services*, 436 U.S. 568, 98 S.Ct. 2018, 56 L.Ed. 611 (1978). Murdock's

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[9] The jury did find that Murdock acted in "good faith". (r. at 1001) It should be noted that the issue presented to the jury used the subjective "good faith" standard. (r. at 993) In light of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982), the issue as presented was incorrect and should be analyzed in conformity with that opinion. Murdock cannot avoid personal liability for constitutional violations by claiming "good faith" where the law was clearly established. *Wood v. Strickland*, 420 U.S. 308 (1975). In the instant case, the law and the facts do not even support a good faith immunity defense. Murdock knew, or should have known, that a warrant of arrest could not issue without a finding of probable cause by a neutral and detached magistrate. There was no contrary authority upon which Murdock could have relied causing him to reasonably believe he had lawful authority to issue warrants. Murdock's acts were taken in clear disregard for the constitutional rights of Crane and those in his class. The record clearly indicates Murdock issued the warrants only because that was the way it was done before he became the clerk in 1976 and he just continued the procedure. Murdock was totally ignorant of the constitutional limitations on his job and said he relied totally on Wade to apprise him of any legal problems. (r., VIII 610-626)

good faith does not cause any reason to reverse the decision to require Dallas County to pay the damages. *Owen v. City of Independence,* 580 F.2d 925 (8th Cir. 1977); remanded 438 U.S. 902 (1978) (in light of *Monell, supra;* on remand 589 F.2d 335 (8th Cir. 1978) (holding no governmental liability based on good faith defense); rev. 445 U.S. 622, 100 S.Ct. 1398 (1980) (holding that a municipality has no immunity from liability flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability). Murdock is an elected official elected by residents of Dallas County only. Art. 5 § 20, Texas Constitution. Vacancies in the county clerk's office are filled by the County Commissioners. Tex. Rev. Civ. Stat. Art. 1935, Tex. Const. Art. 5 § 20. The county clerk takes an oath and posts a bond payable to the county. Tex. Rev. Civ. Stat. Art. 1937 § 3. The premiums on the bond are payable out of county funds. Tex. Rev. Civ. Stat. Art. 1937 § 5. As exemplified by the status of the County Clerk under Texas Law, Murdock's acts then become the will of the entity (Dallas County) as exercised by the official elected directly by its citizens to perform the duties of county clerk. Thus, it is appropriate to require Dallas County to be responsible for the damage caused, at least in part, by one of Dallas County's own officials.

> Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. [citations omitted] The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended

> actions to err on the side of protecting citizens' constitutional rights. [footnote omitted] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. [footnote omitted]

*Owen v. City of Independence, Missouri,* 445 U.S. at 652, 100 S.Ct. at 1416, 63 L.Ed.2d at 694 (1980).

For a further discussion in regard to a Texas county official's responsibility under *Monell,* see *VanOotenghem v. Gray,* 584 F.Supp. 897 (D.C. Houston, 1984); 628 F.2d 488 (5th Cir. 1980); 640 F.2d 12 (5th Cir. 1981); 654 F.2d 304 (5th Cir. en banc 1981), cert. denied 455 U.S. 897, 102 S.Ct. 1255 (1982).

## V. The Petitioners Actually Seek To Have This Court Consider The Repeal Of The Fourth Amendment In Their Petition For Certiorari.

Petitioners Dallas County, et al. are apparently asking this Court to repeal the Fourth Amendment of the United States Constitution. Needless to say, the Fourth Amendment does not exempt Dallas County from its application, nor does it exempt the capias arrest warrant from its application. Lest the petitioners forget, the Fourth Amendment clearly states that ". . . no warrant shall issue, but upon probable cause . . ." Not even *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) stands for the proposition that an arrest warrant need not be supported by a "probable cause affidavit" and further *Gerstein* does not approve of the dispensing with a neutral, detached magistrate in the determination of probable cause before a warrant can issue. In truth, *Gerstein*

supports Crane's position, because this Court said in *Gerstein* that a prosecutor may not assume that an information is in of itself a determination of probable cause. Id. at 116-118. Further, Justice Powell in *Gerstein* stated the following:

> . . . In *Albrecht v. United States*, 273 U.S. 1, 5; 47 S.Ct. 250, 251; 71 L.Ed. 505 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment. . . . Id. 420 U.S. 117.

Petitioners Dallas County et al. wish this Court to believe that *Gerstein v. Pugh* authorizes the issuance of an arrest warrant without probable cause and without a probable cause determination before a neutral magistrate, but only upon the decision of the Dallas County District Attorney based on a conclusionary affidavit notarized by him. Petitioners' apparent claim that a post-arrest determination of probable cause is acceptable and constitutional in the factual context of this case is not what *Gerstein* holds. Petitioners' proposition is so absurd as to cause Respondent to wonder if Petitioners have read the same case as Respondent.[10]

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[10] The cases of *Dommer et al. v. Hatcher*, 427 F.Supp. 1040 (N.D. Indiana, 1975) and *Dommer v. Crawford*, 653 F.2d 289 (7th Cir. 1981) cited by Dallas County, et al. as allegedly conflicting with this case are also based on petitioners wrongfully held assumption that an arrest without probable cause can be alleviated by a post-arrest visit to a magistrate.

As if the above is not enough, Petitioner Dallas County, et al. wishes this Court to believe that *Shadwick v. City of Tampa* 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed2d 783 (1972) has been overlooked by the Court of Appeals and conflicts with the Court of Appeals opinion herein. This is patently false. Apparently, Petitioner has failed to note that the city clerks in *Shadwick* were supervised by a judge, and the city clerks in *Shadwick* were apparently presented with an affidavit stating probable cause and were deemed capable of making probable cause determinations. None of these factors are even remotely present herein. Further, the Tampa City Charter authorized the clerks to determine probable cause and that is not the case here. *Knox v. State,* 586 S.W.2d 793 (Tex.Crim.App. 1980); *Sharp v. State,* 677 S.W.2d 512 (Tex.Crim.App. en banc 1984).[11]

## VI. Not All The Petitioners Have Standing To Seek Further Appeal By A Writ Of Certiorari.

Neither the Orders/judgment rendered by the District Court, nor the Opinions/order of the Court of Appeals for the Fifth Circuit give any reason whatsoever for the Dallas County Criminal Court Judges, i.e., Ben Ellis, John Orvis, Mike Schwille, Berlaind Brashear, or John McCall to further appeal this cause by a writ of certiorari because

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[11] Throughout this litigation, the Petitioner-defendants have taken the position that the Texas Code of Criminal Procedure authorizes the county clerk to issue capias warrants without an indictment. Art. 23.04 of the Texas Code of Criminal Procedure clearly states the contrary. "In misdemeanor cases, the capias or summons shall issue from a *court* having jurisdiction."

nothing has been done to them which would give them any reason to believe they have been harmed.[12] The Court of Appeals correctly noted the status of the Judges' appeal in the following footnote found at page 421 of the Court's Opinion:

> "In any event, the ground of the judges' appeal is by no means clear. They have been assessed neither with damages nor with attorneys' fees; no declaratory or injunctive relief has been granted against them. We are thus at a loss as to what the judges are appealing from." *Crane v. State of Texas,* 759 F.2d at 421.

For what appears to be obvious to everyone except the Dallas County Criminal Court judges, there simply is no reason for them to seek an application for a writ of certiorari.

## REQUEST FOR ATTORNEY'S FEES

Respondent hereby requests the Court to establish and award an attorneys' fee for services performed on this matter subsequent to the Fifth Circuit's judgment. In the alternative, Respondent requests remand to the trial court for this purpose.

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[12] Two of the original County Criminal County Judges named as defendants herein i.e., Tom Price and Harold Entz, apparently elected not to be involved in any appeal either to the Court of Appeals or to this Court. Perhaps they recognized the folly of the decision to appeal.

## CONCLUSION

For the reasons stated above, as well as the reasons contained in the opinions rendered by the Court of Appeals for the Fifth Circuit, petitioners have failed to present any substantial or meritorious reason for granting their respective applications for certiorari, nor have petitioners stated any reasons to believe that the Court of Appeals opinions herein truly conflict with any other decision of any of the several Courts of Appeals. Further, petitioners have not demonstrated any reason in law to believe that this Court should exercise its supervisory powers over the Court of Appeals. Therefore, Respondent requests that both applications in all things be denied.

Respectfully submitted,

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